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Supreme Court of the United States

VISION SERVICE PLAN,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* PREVENT BLINDNESS AMERICA ET AL. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

Amici curiae Prevent Blindness America, the National Association of School Nurses and the National

[1] Pursuant to Supreme Court Rule 37.6, the *amici curiae* — the National Society to Prevent Blindness (d/b/a Prevent Blindness America), the National Association of School Nurses and the National Council of La Raza — affirm that no counsel for any party authored this brief in whole or in part. No person or entity — other than the *amici curiae*, their members, or their counsel — made a monetary contribution specifically for the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), the *amici curiae* respectfully submit this brief in support of the petition for a writ of certiorari. All of the parties have consented in writing to the filing of this brief, and copies of the consent letters have been filed with the Court.

Council of La Raza are nonprofit charitable organizations. Although the *amici curaie* have diverse histories and purposes, they share the common goal of protecting and improving the eyesight of uninsured and underinsured children as partners in the Sight for Students program established by petitioner Vision Service Plan.

Prevent Blindness America ("PBA") is the nation's leading nonprofit organization dedicated to preventing blindness and improving eyesight. A small group of social leaders and scientists in New York City founded PBA in 1908. They created the organization in response to a simple question posed by Louisa Lee Schuler, one of PBA's founders — "Can it be possible that in a civilized country like our own, one in which the most scientific methods are supposed to be in use, babies are allowed to lose their eyes when they might have been saved?"

Since its inception, PBA and its partners have worked to ensure that no child is robbed needlessly of a lifetime of sight. As one of its first acts of public service, PBA successfully championed legislation that virtually eliminated one cause of infant blindness — ophthalmia neonatorum — by mandating that all newborns receive eye drops containing silver nitrate. Over the last 100 years, PBA has continued on its mission to eliminate preventable blindness and preserve and improve sight through public and professional education, advocacy, certified vision screening and training, community and patient service programs and research. PBA has set as one of its goals that by 2020 it will reduce vision loss by ensuring that all children receive appropriate vision care as they enter school.

With nearly 14,000 members, the National Association of School Nurses ("NASN") is the nation's largest association of school nurses and it operates as a hub for affiliated state associations throughout the country. Originally established by the National Education Association in 1968, NASN's purpose is to improve the quality of school nursing, the health of school children, and the ability of children to succeed in the classroom. NASN members represent almost every facet of school health care delivery, including school nurses in public and private schools, school nurse administrators and school nurse educators.

NASN has been working to improve the health of the nation's school children for more than forty years. As a core part of its mission, NASN sets standards of practice and provides educational programs to school nurses. NASN has also fought for positive changes to the nation's health care policy. Among its other activities, NASN has sponsored research, published issue briefs and position statements, and advocated to Congress for policies that will promote student health and school nursing.

The National Council of La Raza ("NCLR") is the largest national Hispanic civil rights and advocacy organization in the United States. Founded in 1968, NCLR was established to address the fundamental lack of institutional support for the Mexican American community and the lack of public awareness regarding the challenges facing that community. In the forty years since its founding, NCLR and its network of nearly 300 affiliated community-based organizations has expanded its mission to focus on improving opportunities for all Hispanic Americans. NCLR and its affiliates touch the lives of millions of Hispanic Americans each year in 41 states, Puerto

Rico, and the District of Columbia, focusing on issues of health care, civil rights, immigration, education, and investment in Hispanic communities.

The national advocacy and community-based assistance provided by PBA, NASN and NCLR is made possible, in large part, by the charitable support of partners, volunteers, and contributors.[2] Petitioner Vision Service Plan ("VSP"), through its Sight for Students Program, has been an important and generous contributor to the community-based efforts of PBA, NASN and NCLR (collectively, the "SFS Partners").

Sight for Students is a VSP-sponsored charity that, since its inception in 1997, has provided free eye exams and glasses to hundreds of thousands of children from low-income and underprivileged families.[3] The program operates nationally through a network of community partners, including the SFS Partners, that conduct vision screenings on a local level to identify children with eye or vision problems. Once such a child is identified, the SFS Partner provides the child with a voucher from VSP that the child can redeem to receive free eye care services from a VSP network doctor. Combined, the three SFS Partners that are *amici curiae* here have distributed more than 275,000 vouchers that have been redeemed for

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[2] PBA, NASN and NCLR are nonprofit, tax-exempt organizations classified as public charities under § 501(c)(3) of the Internal Revenue Code. The tax-exempt status of these three organizations is not called into question by the Ninth Circuit's decision.

[3] To participate in the Sight for Students program, a child must (among other requirements) be part of a family with an income that is no more than 200% of the federal poverty level and must not be eligible for Medicaid or other vision insurance.

over $55 million in free eye care and eyewear. In total, VSP vouchers have been redeemed by nearly half a million children across the country for more than $90 million in free eye care and eyewear.

The SFS Partners have joined as *amici curiae* because they believe that the Ninth Circuit's decision upholding the IRS's revocation of VSP's tax-exempt status frustrates, rather than furthers, their shared goal of improving and protecting the sight of America's children. Specifically, the Ninth Circuit's decision threatens to divert to the federal treasury funds from the Sight for Students program that are needed to provide eye care to low-income, uninsured, and underinsured children. The adverse impact of the Ninth Circuit's ruling, thus, extends far beyond VSP, undermining the mission of the SFS Partners and, far more importantly, jeopardizing the eye care of hundreds of thousands of children.

The SFS Partners also are concerned that the Ninth Circuit's decision could have detrimental effects on other charitable institutions and programs that extend beyond the Sight for Students program. As we explain below, the Ninth Circuit's decision threatens not only the tax-exempt status of all nonprofit Health Maintenance Organizations ("HMOs"), but also the continued viability of the charitable programs sponsored by those nonprofit HMOs. Given the substantial harm that could be caused by the Ninth Circuit's decision, the SFS Partners submit this brief as *amici curiae* in support of petitioner VSP.

SUMMARY OF ARGUMENT

The IRS and Ninth Circuit have intruded into the province of the legislature by rewriting decades of settled health care tax policy to threaten the very

existence of nonprofit HMOs. The potential ramifications of this case extend far beyond the revocation of petitioner VSP's 40-year tax-exempt status. The Ninth Circuit's decision calls into question the tax-exempt status of every subscriber-based, nonprofit health care entity.[4] The collateral damage of the Ninth Circuit's decision extends far beyond nonprofit HMOs themselves to include charitable entities, such as the SFS Partners, that rely heavily on charitable contributions from nonprofit HMOs such as VSP.

In its decision, the Ninth Circuit ruled that an entity cannot qualify for tax-exempt status under 26 U.S.C. § 501(c) "if the entity's primary purpose * * * is to establish a fund from payments by subscribers to defray and assume the costs of health care for those subscribers." App. 2a. Every nonprofit HMO shares this same primary purpose. In fact, Congress, by statute, has mandated that a health care entity must embody these basic qualities to qualify under federal law as an HMO. *See* 42 U.S.C. § 300e(a)-(b). As a result, no nonprofit HMO can qualify for tax-exempt status under the Ninth Circuit's interpretation of § 501(c), because each one arguably has as its primary purpose the provision of health care to a finite population of subscribers rather than the promotion of the "general welfare of the community." Pet App. 2a. In coming to this conclusion, the Ninth Circuit reversed the status quo in which, for over four decades, nonprofit, subscriber-based HMOs have been granted tax-exempt status.

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[4] The decision below of the United States Court of Appeals for the Ninth Circuit in *Vision Serv. Plan v. United States*, 265 F. App'x 650 (9th Cir. 2008), is reproduced in the Appendix to VSP's petition ("Pet. App.") at pages 1a-3a.

In addition to calling into question the tax-exempt status of all nonprofit HMOs, the Ninth Circuit's decision imperils countless charities, like the SFS Partners, that rely upon contributions by nonprofit HMOs to provide healthcare to underserved communities. The Ninth Circuit's decision risks diverting to the federal treasury funds that are currently being used to support community-based charitable programs, and it removes the incentive for nonprofit HMOs to retain their nonprofit status and to maintain their current level of contributions to charitable programs. Empirical evidence confirms that nonprofit HMOs contribute more generously (by a significant margin) to charities than their for-profit counterparts. *See infra*, p. 12.

VSP's Sight for Students program provides a perfect example of the kinds of charitable endeavors that are placed in jeopardy by the Ninth Circuit's decision. Over the last decade, VSP's Sight for Students program has improved the sight (and as a result the academic performance, athletic capability and self-esteem) of almost half-a-million children from low-income and underprivileged families at a cost to VSP of $92.3 million. By upholding the IRS's revocation of VSP's tax-exempt status, the Ninth Circuit jeopardizes the ability of hundreds of thousands of children to obtain vision care through the Sight for Students program over the next decade. Even worse, the Sight for Students program is but one program, by one nonprofit HMO, in one segment of the health care community. Given the sweeping effect of the Ninth Circuit's analysis, the appellate ruling could have devastating consequences across the country for charities and the communities that rely upon them.

A change of decades-established federal law with consequences of this magnitude should come from only one source — Congress. And yet, Congress has unambiguously stated, in the plain words of the Internal Revenue Code and in supporting legislative history, that it intends for nonprofit HMOs to continue to be eligible for tax-exempt status. When Congress enacted 26 U.S.C. § 501(m) to remove the Blue Cross and Blue Shield entities' tax-exempt status under § 501(c), it specifically included a provision, § 501(m)(3)(B), to protect the tax-exempt status of nonprofit HMOs. In doing so, Congress unambiguously conveyed its intent for nonprofit HMOs to retain their tax-exempt status. The Ninth Circuit's decision contradicts this clear intent. The Ninth Circuit's decision also renders § 501(m)(3)(B) meaningless. If, as the Ninth Circuit's decision implies, no nonprofit HMO can qualify for tax-exempt status under § 501(c), then § 501(m)(3)(B), which applies only to tax-exempt nonprofit HMOs, has no effect.

Because the Ninth Circuit's decision reverses a status quo in federal law that has been settled for decades, contravenes Congress's intent, renders a statutory provision meaningless, and, most importantly, imperils charities and the populations they serve throughout the country, the Ninth Circuit's decision warrants review by this Court.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION ENDANGERS IMPORTANT CHARITABLE PROGRAMS, SUCH AS SIGHT FOR STUDENTS.

The Ninth Circuit's decision upholding the IRS's revocation of VSP's tax-exempt status is, in effect, the

death knell for nonprofit HMOs. For more than three decades — since a court first recognized the tax-exempt status of nonprofit HMOs in *Sound Health Ass'n v. Commissioner*, 71 T.C. 158 (1978) — it has been an accepted principle of federal law that nonprofit HMOs are eligible for tax-exempt status under 26 U.S.C. § 501(c). Nonprofit HMOs were granted tax-exempt status based on the fundamental premise, formalized by the IRS in Rev. Rul. 69-545, 1969-2 C.B. 117, that "the promotion of health is considered to be a charitable purpose."

The Ninth Circuit's decision upends federal tax law by rejecting this premise. The Ninth Circuit began its decision by noting that the relevant regulation, 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i), requires nonprofit HMOs such as VSP to be "primarily engaged in promoting in some way the common good and general welfare of the community." Pet. App. 2a. The Ninth Circuit then concluded, contrary to the understanding of federal law that has prevailed for more than three decades, that VSP could not qualify for tax-exempt status because:

> "VSP's own articles of incorporation state that the primary purpose of the corporation is to establish a fund from payments by subscribers to defray and assume the costs of vision care for those subscribers. This is a purpose that benefits VSP's subscribers rather than the general welfare of the community." *Id.*

The Ninth Circuit's decision to revoke VSP's tax-exempt status based on this statement in VSP's articles of incorporation should not be allowed to stand, because in this respect VSP's articles of incorporation merely state the minimum statutory requirements for a health care entity to qualify as an

HMO under federal law. The defining characteristics of an HMO are that it establish a subscriber base, collect payments from its subscribers, and in return, provide health care to those subscribers. Congress set forth these elements in 42 U.S.C. § 300e(a)-(b). The relevant portion of § 300e(a) states:

> "the term 'health maintenance organization' means a public or private entity which is organized under the laws of any State and which (1) provides basic and supplemental health services to its members in the manner prescribed by subsection (b) of this section."

Subsection (b) of § 300e then provides in pertinent part:

> "Each member is to be provided basic health services for a basic health services payment which (A) is to be paid on a periodic basis without regard to the dates health services (within the basic health services) are provided * * *." *Id.* § 300e(b)(1).

In short, the Ninth Circuit revoked VSP's tax-exempt status solely because VSP complied with the basic requirements for an HMO imposed by federal law.

The scope and likely consequences of the Ninth Circuit's decision are far reaching. In effect, the Ninth Circuit has ruled that nonprofit HMOs cannot qualify for tax-exempt status under § 501(c) because of their inherent — and statutorily mandated — purpose of providing health care services to a base of paying subscribers. This ruling has potentially devastating consequences not only for nonprofit HMOs, but also for the charities, like the SFS Partners, that rely upon contributions from nonprofit HMOs. By issuing a decision that precludes nonprofit HMOs

from retaining tax-exempt status, the Ninth Circuit has endangered such charities in two significant ways.

First, the Ninth Circuit's decision diverts to the federal treasury funds that are currently needed to maintain the viability of charitable programs throughout the United States. Nonprofit HMOs, like VSP, have a limited supply of money to divide between providing health care to subscribers and supporting charitable programs. HMOs have no choice but to provide health care to subscribers. As a result, nonprofit HMO's will almost certainly have no choice but to look to pay their newly-imposed tax liability, at least in part, from funds previously allocated to charitable programs.

Second, the Ninth Circuit's decision removes the legal incentive for nonprofit HMOs to continue to support charitable programs to maintain their nonprofit status. Prior to this case, the IRS had taken the position that nonprofit health care entities must provide "at least some 'indicia of charity' in the form of serving the public and providing some services free of charge." See, *e.g.*, *Geisinger Health Plan v. Comm'r*, 985 F.2d 1210, 1216 (3d. Cir. 1993). Similarly, states have imposed community service requirements as prerequisites to nonprofit status. See, *e.g.*, *Hospital Utilization Project v. Commonwealth of Pennsylvania*, 487 A.2d 1306, 1316-1317 (Pa. 1985). By erecting a barrier to tax-exempt status that, for nonprofit HMOs, is insurmountable, the Ninth Circuit has eliminated the financial incentive for these nonprofit HMOs to continue to engage in charitable endeavors.

If not reversed, the Ninth Circuit's decision could have disastrous consequences for charitable pro-

grams. Across the country, nonprofit HMOs provide health care to low-income, uninsured and underinsured Americans, and support charitable programs in their local communities. The detrimental impact of withdrawing tax-exempt status from nonprofit HMOs is not speculative. A comprehensive comparison of the community benefit activities of nonprofit and for-profit HMOs concluded:

> "Nonprofit HMOs were significantly more likely to provide subsidies for medical services in the community and to support safety-net health care agencies, including support for community health centers and mental health centers. Nonprofit HMOs also were more likely to target their community benefit programs to low-income neighborhoods in the communities that they serve. Also observed were consistent ownership-related differences in terms of more general philanthropy * * *."[6]

To appreciate the full extent of the harm caused by the Ninth Circuit's decision, the Court must understand the substantial good work done by the charities sponsored by nonprofit HMOs. VSP's Sight for Students program provides a compelling example and demonstrates the difference that can be made by one such charitable program.

VSP founded the Sight for Students program in 1997 to provide free eye exams and glasses to low-income, uninsured and underinsured children. The program addresses a significant need. According to

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[6] Mark Schlesinger, Shannon Mitchell & Bradford Gray, *Measuring Community Benefits Provided by Nonprofit and For-Profit HMOs*, 40 INQUIRY 114, 126-127 (Summer 2003), *available at* http://lists.allenpress.com/INQR/i0046-9580-040-02-0114.pdf.

the American Optometric Association, one in four children have some form of vision problem.[6] Yet, studies have demonstrated that only 25 percent of preschool-age children receive any kind of vision testing.[7]

A vision problem, left uncorrected, can do serious harm to a child's development and quality of life. According to the Center for Disease Control and Prevention, "[i]mpaired vision can affect a child's cognitive, emotional, neurological and physical development by possibly limiting the range of experiences and kinds of information [to which] the child is exposed."[8] The effect of an uncorrected vision problem on the ability of a child to succeed in school can be devastating. Approximately 80 percent of what a child learns is learned visually.[9] Some vision problems, if not corrected at an early age, can lead to permanent disability and blindness. For example, amblyopia, or "lazy eye," is a condition affecting "2 to 3 out of every 100 children" and results in reduced vision in an eye that has not received adequate use during early childhood.[10] If left untreated until age

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[6] American Optometric Association, Ready for School, Frequently Asked Questions Regarding Children's Vision, http://www.aoa.org/x5068.xml.

[7] Richard C. Wasserman, Candace A. Croft, Sarah E. Brotherton, *Preschool Vision Screening in Pediatric Practice: A Study from the Pediatric Research in Office Settings (PROS) Network*, 89 PEDIATRICS 834, 834 (1992).

[8] Center for Disease Control and Prevention, What is Vision Impairment? (Oct. 29, 2004), http://www.cdc.gov/ncbddd/dd/vision2.htm.

[9] American Optometric Association, School-Aged Vision: 6 to 18 Years of Age, http://www.aoa.org/x9451.xml#1.

[10] National Eye Institute, Amblyopia (Mar. 2008), http://www.nei.nih.gov/health/amblyopia/amblyopia_guide.asp.

six, amblyopia will most often result in some permanent vision impairment. If left untreated until age ten, the eye may become functionally blind.

Uncorrected vision problems are also a significant drain on the nation's economy. A 2002 study reported that untreated amblyopia alone costs the United States an estimated $7.4 billion in earning power each year.[11] If a child becomes visually impaired, the additional costs for medical visits, home modifications and lost productivity are estimated at $601,000 over the child's lifetime.[12]

The Sight for Students program addresses the problem of childhood vision impairment in two steps — vision screening and treatment. VSP's community partners, including the *amici curiae* SFS Partners, identify children in need. PBA, for example, conducts vision screenings in communities across the United States that are otherwise underserved. From 2000 to 2007, PBA-certified vision screeners screened more than 11 million children, referring approximately 935,000 for comprehensive eye care. Many of the vision problems afflicting these children otherwise would have gone undetected. NASN members identify children in need pursuant to their duties as caregivers within the school community. NCLR identifies

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[11] Jaime H. Membreno, Melissa M. Brown, Gary C. Brown, Sanjay Sharma & George R. Beauuchamp, *A Cost-utility Analysis of Therapy for Amblyopia*, 109 OPHTHALMOLOGY 2265, 2269 (2002).

[12] Center for Disease Control and Prevention, *Economic Costs Associated with Mental Retardation, Cerebral Palsy, Hearing Loss, and Vision Impairment — United States, 2003* (Aug. 18, 2006), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5303a4.htm, *amended by erratum at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5532a5.htm.

children in need through its network of affiliated charter schools, daycare centers and health programs in predominantly Hispanic communities.

These screening efforts — though a vital component of the Sight for Students program — would be futile in many cases without the charitable participation of VSP. The most challenging element of any screening program is ensuring that those who fail the screening receive the appropriate follow-up care. VSP provides that care to children in need by distributing vouchers to its SFS Partners that can be redeemed for free eye exams and glasses from any VSP network doctor.

The Sight for Students program makes a real difference. Every year, VSP network doctors correct the vision of more than 50,000 children through the Sight for Students program. Since the program's inception, VSP has provided free eye care and eyewear to more than 472,000 children at an average cost of approximately $195 per child. Without Sight for Students, it is highly unlikely that these children would have received the eye care and eyewear they needed to excel in academic and physical activities and to maintain a healthy self-esteem. These services have been provided at a substantial cost to VSP. The total value of the free health care provided by VSP through the Sight for Students program is approximately $92.3 million.

As beneficent as the Sight for Students program is — substantially improving the quality of life of almost half-a-million children over the last decade — it is but one charity, addressing one kind of need, sponsored by one nonprofit HMO. Throughout the United States, other nonprofit HMOs participate in similar community benefit programs. As we noted

above, *supra* p. 12, nonprofit HMOs are significantly more likely than their for-profit counterparts to sponsor or participate in community benefit programs that target low-income neighborhoods. The Ninth Circuit's decision needlessly imperils these programs, to the detriment of low-income communities across the country.

II. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO CONGRESS'S INTENT FOR NONPROFIT HMOs TO REMAIN ELIGIBLE FOR TAX-EXEMPT STATUS.

If countless charities throughout the United States are to be imperiled by the elimination of tax-exempt status for nonprofit HMOs, it should be because Congress has exercised its democratic mandate to enact legislation setting the nation's health care policy. That is not what happened in this case. For four decades, it has been accepted federal law that "the promotion of health is considered to be a charitable purpose" that qualifies nonprofit health care organizations for tax-exempt status under § 501(c). Rev. Rul. 69-545, 1969-2 C.B. 117. Congress enacted no law altering this fundamental principle. Nor did the IRS issue a regulation. Rather, the IRS simply decided that it no longer wished to follow its own Revenue Ruling.

The Ninth Circuit's approval of this reversal-of-course by the IRS in an unpublished decision impermissibly contradicts Congress's intent and renders a statutory provision enacted by Congress meaningless. This Court has recognized that "where Congress has made its intent clear, 'we must give effect to that intent.'" *Miller v. French*, 530 U.S. 327, 336 (2000), quoting *Sinclair Refining Co. v. Atkinson*, 370 U.S.

195, 215 (1962). In this case, Congress unambiguously expressed its intent for nonprofit HMOs to remain eligible for tax-exempt status when it enacted 26 U.S.C. § 501(m)(3)(B). The Ninth Circuit's decision conflicts with this clear intent.

In 1986, Congress enacted 26 U.S.C. § 501(m) as part of its reconsideration of the tax-exempt status of health care organizations in the United States. The purpose of § 501(m) was to address what Congress deemed to be an unwarranted competitive imbalance between certain tax-exempt commercial insurers — specifically, Blue Cross and Blue Shield entities — and their non-exempt counterparts. In proposing the bill, the House Ways and Means Committee singled-out the Blue Cross and Blue Shield entities by name. H.R. Rep. No. 99-426, at 664 (1985), *reprinted in* 1986-3 C.B. (vol. 2), at 664. The Committee further concluded that such entities are "engaged in an activity whose nature and scope is so inherently commercial that tax-exempt status is inappropriate" and that "the tax-exempt status of organizations engaged in insurance activities provides an unfair competitive advantage to those organizations." *Id.*

To level the playing field, Congress legislated in § 501(m)(1) that an organization can only be tax exempt under § 501(c) "if no substantial part of its activities consists of providing commercial-type insurance." Congress did not, however, simply pull the tax-exempt rug out from underneath the Blue Cross and Blue Shield entities. Rather, it enacted 26 U.S.C. § 833, entitled *Treatment of Blue Cross and Blue Shield Organizations, Etc.*, which established a special tax framework to facilitate the transition of Blue Cross and Blue Shield entities to non-exempt tax status.

When Congress revoked the Blue Cross and Blue Shield entities' tax-exempt status by enacting 26 U.S.C. § 501(m), it also included provisions — § 501(m)(3)(A)-(E) — designed specifically to protect the tax-exempt status of other entities, including nonprofit HMOs. To ensure that nonprofit HMOs continued to be eligible for tax-exempt status, 'Congress enacted § 501(m)(3)(B), which provides that "commercial type insurance' shall not include"

> "incidental health insurance provided by a health maintenance organization of a kind customarily provided by such organizations."

Congress's intent in enacting this provision is unambiguous. Congress intended for nonprofit HMOs to continue to be eligible for tax-exempt status.

By making it impossible for nonprofit HMOs to qualify for tax-exempt status under 26 U.S.C. § 501(c), the Ninth Circuit's decision not only fails to give effect to Congress's intent, it also renders 26 U.S.C. § 501(m)(3)(B) meaningless. As this Court held in *Freytag v. Commissioner*, courts should not "interpret a statutory provision so as to render superfluous other provisions in the same enactment." 501 U.S. 868, 877 (1991), *quoting Pa. Dept. of Welfare v. Davenport*, 495 U.S. 552, 562 (1990). Here, the Ninth Circuit has interpreted 26 U.S.C. § 501(c) so as to render superfluous § 501(m)(3)(B). Section 501(m)(3)(B) only applies to one category of entities — nonprofit HMOs that are tax exempt under § 501(c). The statutory provision protects those nonprofit HMOs from having their tax-exempt status revoked by the "commercial insurance" exclusion embodied in § 501(m)(1). If, as the Ninth Circuit held (Pet. App. 2a), § 501(c) does not apply where the primary purpose of the entity is to establish a fund from

payments by subscribers to defray and assume the costs of health care for those subscribers, then no nonprofit HMO would be able to qualify under § 501(c) and § 501(m)(3)(B) would have no purpose or meaning. The Ninth Circuit does not address this irreconcilable conflict between the effect of its decision and Congress's intent. Nor does the Ninth Circuit explain why Congress would bother to specify protections for nonprofit HMOs in § 501(m)(3)(B) if no nonprofit HMO could qualify for tax-exempt status under § 501(c) in the first instance.

The plain text of § 501(m)(3)(B) is not the only compelling evidence that Congress intended for nonprofit HMOs to continue to be eligible for tax-exempt status. Congress's intent is further confirmed by 26 U.S.C. § 833. In § 833, Congress conferred special tax status on Blue Cross and Blue Shield entities to ease their transition to nonexempt status. By enacting § 833, Congress acknowledged and ameliorated the difficulties imposed on entities that, after having had tax-exempt status for decades, were suddenly deprived of that status. Congress made no similar provision for nonprofit HMOs such as VSP. Given the precedent Congress set by enacting special tax provisions for the Blue Cross and Blue Shield entities, it seems unlikely that Congress foresaw, much less intended for, the Ninth Circuit's wholesale revocation of tax-exempt status for the industry of nonprofit HMOs without enacting similar tax provisions to ease the transition of these nonprofit HMOs to non-exempt status.

Legislative history also confirms that Congress intended for nonprofit HMOs to continue to be eligible for tax-exempt status. In the Conference Report for the Technical and Miscellaneous Revenue Act of

1988, Congress reaffirmed its intent to maintain tax-exempt status for nonprofit HMOs in general, and vision care HMOs such as VSP, in particular.

> "Under the 1986 Act, the provision relating to organizations engaged in commercial-type insurance activities did not alter the tax-exempt status of health maintenance organizations (HMOs). HMOs provide physician services in a variety of practice settings primarily through physicians who are either employees or partners of the HMO or through contracts with individual physicians or one or more groups of physicians (organized on a group practice or individual practice basis). The conference agreement clarifies that, *in addition to the general exemption for health maintenance organizations, organizations that provide supplemental health maintenance organization-type services (such as dental or vision services) are not treated as providing commercial-type insurance if they operate in the same manner as a health maintenance organization.*" H.R. Conf. Rep. No. 100 - 1104, at 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5048, 5069 (emphasis added).

Thus, Congress has stated its intent for there to be a "general exemption for health maintenance organizations." This statement by Congress cannot be reconciled with the Ninth Circuit's decision, which (as discussed at pp. 9-10, *supra*) would deny tax-exempt status to any entity based solely on the fact that the entity satisfies the minimum federal statutory requirements to qualify as an HMO. Additionally, Congress singled out supplemental health maintenance organizations that provide vision care as an example of the kind of HMO that should

continue to be tax-exempt. VSP is the nation's largest vision care HMO. As a result, this Conference Report provides compelling evidence that Congress intended for VSP and similar vision care HMOs to retain their tax-exempt status.

In short, the Ninth Circuit's decision raises an issue of national importance. It is at odds with a body of tax law that has been settled for decades. It portends the revocation of tax-exempt status for nonprofit HMOs throughout the country. And perhaps most significantly, it delivers a terrible blow to charities performing important work throughout the United States. VSP's Sight for Students program, which has improved the eyesight of nearly half a million children, is representative of the good work imperiled by the Ninth Circuit's decision. The decision itself is erroneous. The Ninth Circuit's holding — that nonprofit HMOs cannot qualify for tax-exempt status because their primary purpose is to provide health care to paying members — contravenes Congress's intent and renders a statutory provision, § 501(m)(3)(B), meaningless. Accordingly, this Court should grant VSP's petition for a writ of certiorari in order to reverse the Ninth Circuit's decision.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

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